In the

# United States Court of Appeals

## For the Ninth Circuit

REYNOLDS METALS COMPANY, *Appellant*,
vs.
PAULA MARTIN, by and through Arthur H. Lewis, her Guardian Ad Litem, *Appellee*. } No. 14,990

REYNOLDS METALS COMPANY, *Appellant*,
vs.
VERLA MARTIN, *Appellee*. } No. 14,991

REYNOLDS METALS COMPANY, *Appellant*,
vs.
PAUL MARTIN, *Appellee*. } No. 14,992

# APPELLANT'S REPLY TO BRIEF IN ANSWER TO PETITION FOR REHEARING

Rehearing en Banc on Appeal from Final Judgments of the District Court for the District of Oregon

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## PRELIMINARY STATEMENT

In its Petition for Rehearing en Banc, appellant did not discuss all the questions presented by this

appeal (Appellant's Brief, pp. 7-8). In their Brief In Answer To Petition For Rehearing, appellees note this (pp. 2-3) and assume that the matters not discussed in the Petition for Rehearing en Banc are to be considered as settled. Such assumption is not warranted. A rehearing by a court is a fresh and complete consideration of the whole record of a case. If the order granting the petition for rehearing does not limit the subject matter of the rehearing, the attitude of the case is the same as if it had not previously been submitted.

*United States v. Bentley & Sons Co.* (D.C. Ohio, 1923) 293 Fed. 229

*Pitek v. McGuire* (1947) 51 N.M. 364, 184 P. (2d) 647

*Conway, et al, v. Fabian, et al* (1939) 108 Mont. 287, 89 P. (2d) 1022; cert. den. 308 U.S. 578, 84 L. Ed. 484

*Kroeger v. Twin Buttes R. Co.* (1912) 14 Ariz. 269, 127 Pac. 735

O'Brien, Manual of Federal Appellate Procedure (Third Edition, 1941) p. 223

Inasmuch as the order of this court granting the rehearing did not restrict the subject matter of the rehearing, each of the issues arising from the questions presented is before the court at this time (Appellant's Brief, pp. 7-8).

Those questions are as follows:

(1) Where a defendant performs with all possible care acts of a routine business character which have never caused injury and as to which he has no reason to believe that human beings are susceptible to injury, can he be held liable for negligence if such acts result in injury to a human being?

(2) Where according to all past experience it is not foreseeable that a human being is susceptible to injury from a certain course of action taken with all possible care, if injury results from such course of action can negligence be inferred against the source of the action through application of *res ipsa loquitur?*

(3) Did the plaintiffs below present any substantial evidence sufficient for submission to the jury that the claimed injuries were proximately caused by emanations of fluoride from the defendant's plant?

(4) Were the claims of Paul and Verla Martin barred by the statute of limitations?

If any of the foregoing questions is answered in the negative, the appropriate judgments should be reversed, with instructions to enter judgment for the appellant.

In addition, the following questions are presented with respect to the conduct of the cases below:

(5) Were the instructions to the Court below to the jury with respect to *res ipsa loquitur* reversible error?

(6) Was the failure of the Court below to give the instruction to the jury requested by appellant with regard to the statute of limitations applicable to the claims of appellees Paul and Verla Martin reversible error?

(7) Was the admission of evidence by the Court below with respect to damage to cattle by fluorine emanations reversible error?

(8) Was it reversible error to prevent, on a claim of privilege, the appellant from examining before trial two physicians of appellees Paul and Verla Martin, in view of the fact that they had waived any such privilege through testimony about their own physical condition?

However, it is not appellant's intention to discuss each such question in this brief. The law and facts relative to these questions have been discussed in detail in Appellant's Brief, Appellant's Reply Brief and the Petition for Rehearing en Banc. The following comments are submitted in reply to appellees' Brief In Answer To Petition For Rehearing with the intent of resolving some of the confusion created by appellees' Brief In Answer To Petition For Rehearing.

## I. MISSTATEMENTS OF FACT CONTAINED IN APPELLEES' BRIEF IN ANSWER TO PETITION FOR REHEARING.

The following comments are submitted to correct the manifold number of misstatements and errors contained in appellees' brief:[1]

[1] All references to "appellees' brief" herein are directed to "Brief In Answer To Petition For Rehearing."

A. On page 4 of their brief, appellees caution the court not to confuse "sodium fluoride" with "sodium aluminum fluoride."

Throughout the trial appellees used the terms sodium fluoride and sodium aluminum fluoride interchangeably. Although the fluoride effluent from the plant is sodium aluminum fluoride, they introduced a sample of sodium fluoride in evidence (Plaintiffs' Exhibit O-8). One of their experts testified concerning a lethal dose of sodium fluoride (R. 311).

For the practical purposes of this case, sodium aluminum fluoride and sodium fluoride were treated as the same throughout the time of the trial and up until appellees filed their last brief.

Appellees' effort to distinguish the effects of the two fluorides as far as this case is concerned is absolutely unsupported by the record and contrary to their position at the time of trial. Their motive in attempting to differentiate between the type of fluorine to which they may have been exposed and the type of fluorine purposely added to drinking water is apparent, but the differentiation is without any basis in fact.

B. On page 5 of their brief, appellees represent to the court that there is no dispute as to the "contamination" of their farm. This statement is plainly not true.

The record is replete with testimony which, at the very least, would give rise to a "dispute" as to contamination (R. 1508, et seq).

Appellees have assumed, and attempted to prove, contamination from two statements in the pre-trial order. Their argument can be reduced very simply to this syllogism:

(a) Fluorides contaminate;

(b) Fluorides settle on property;

therefore, such property is contaminated.

Of course this deduction suffers the same defect as any other such argument. The premise does not consider amounts or degrees and, without a limiting amount set, the conclusion cannot be true.

The pleadings and record of this case stand in rebuttal to appellees' statement that their allegation of contamination is not disputed. The settling at various times of a small portion of the fluoride effluents emanating from appellant's plant upon appellees' ranchlands does not, of itself, constitute contamination.

C. Page 6 of appellees' brief contains the statement, "In November, 1950, they (appellees) moved away from their farm to avoid further exposure, *when they ascertained from physicians the cause of their illness*."

(emphasis added) There is no evidence in the record to give support to this statement. In fact, the testimony of appellees' own witnesses indicates that the statement is not true, and that, in fact, appellees were able, only after much searching, to obtain a diagnosis of fluorosis *after* they had left their ranch.

Appellees consulted 16 doctors in their quest for a diagnosis of fluorosis. Of these, five who examined appellees testified for them at the trial, including a chiropractor and a dentist. The chiropractor saw the elder Martins prior to November, 1950, but he did not advise them that their complaints were caused by the ingestion of fluorides (R. 626, 629). The appellees' family doctor, who regularly attended them during the time they lived on their ranch, did not make a diagnosis of fluorosis until some three years after the Martins left the area (R. 326). This tardy diagnosis was admittedly based on certain laboratory data and literature submitted to the doctor by Mr. Martin (R. 326). The remainder of appellees' medical witnesses did not even see the Martins until some time after they had left their ranch (R. 292, 271). One of the doctors who was brought from London, England, to testify had never examined appellees until two days before the trial; almost five years after appellees left their ranch (R. 491).

Indeed, the record does not even suggest that appellees left their ranch in order to escape "exposure." Mr. Martin testified that they left in the winter of 1950-1951 for a two or three month stay in Palm Springs (R. 708). Thereafter, Mr. and Mrs. Martin vacationed in Mexico City before returning again to the ranch (R. 709).

A reading of the record would indicate that appellees probably left the ranch simply because they wished to spend the winter in a warmer climate. However, whatever may have been their reason, appellees have never suggested until now that it was a desire to leave the area of exposure after they had "ascertained the cause of their illness."

D. On page 5 and again on page 13 of their brief, appellees suggest that no evidence was introduced concerning a definite tolerance level of fluorides. By such statements appellees blithely ignore the scientific research and testimony relating thereto constituting a large portion of the record.

For experimental purposes, Edward J. Largent, an industrial chemist, intentionally ingested more than twice the amount of fluorine, over a period of four years, that appellees could possibly have ingested (R. 1097, et seq). Yet the ingestion of this amount of fluorine produced no ill effects (R. 1125).

Such experiments do not serve merely to establish "theoretical" data.

E. On page 8 of their brief, appellees suggest that, inasmuch as the formal order limiting the scope of examination on deposition of Drs. Hill and Proctor had not yet been signed at the time of their depositions, then appellant should not have restricted its examination. They further suggest that, if appellant had taken the depositions without restrictions, then after appellees had testified and thereby waived the privilege, appellant could introduce the deposition. Accordingly, because appellant could have cured the error, it has no standing to complain now.

This suggestion is made by appellees in spite of the fact that Judge East had granted appellees' motion and limited the examination in a prior letter to the attorneys (Case 14,990, p. 73). Appellees' proposition that a party is not bound by the court's order until the same has been formalized and signed is a novel one indeed.

Appellees contend now that the error complained of is harmless error because appellant had a deposition that it could introduce in evidence. The folly of this contention is manifest. The practical effect of the error was sustained when appellant was forbidden to elicit from the deponents their diagnosis of the alleged ills.

F. On page 13 of their brief, appellees state that fluoride compounds from aluminum plant stacks have injured and killed many mammals. "Many instances of human injury are referred to in medical literature." Appellees failed to make this very interesting and important statement until now. During the trial they were completely silent about such literature. *Not one page of such literature is a part of the record of these cases*, the reason being, of course, that there is none.

Appellees' statement is directly contrary to the statement of their own witness, Dr. Hunter:

> "* * * As far as I know there are no writings in the United States about fluorosis in the sense of men being hurt at all." (R. 585)

G. By lifting a portion of appellant's brief out of context, appellees, on page 13 of their brief, would lead the court to believe that appellant, the United States Public Health Service and the Oregon State Board of Health had been concerned about the possibility of injury to humans from the effluents emitted from appellant's stacks. However, a reading of the whole page from which appellees quoted shows that the surveys made by the United States Public Health Service and the Oregon State Board of Health concerned *in-plant* conditions. The results of each of these surveys showed

there was no possibility of injury to those employees working right inside the potrooms (R. 1555-1556). By telling only half the story, appellees would lead the court to believe that, as a result of these surveys, appellees knew, or should have known, of an alleged hazard to persons living miles from the plant!

H. Appellees have made a serious misrepresentation to the court on page 14 of their brief. They quote a portion of Judge East's decision in this case concerning the debate between experts and the difficulty in the establishment of a tolerance level for humans. They then state that Judge Boldt was "forced to the same conclusion" in *Arvidson v. Reynolds Metals Company* and quote two sentences from his opinion. Judge Boldt was not forced to any conclusions regarding tolerance levels of humans. Judge Boldt was concerned only with possible injury to cattle in the *Arvidson* case, and the sentence immediately succeeding the portion quoted by appellees states unequivocally that the subject matter was cattle.

I. On page 16 of their brief, appellees attempt to place before this court evidence which was ruled inadmissible by the trial court, a ruling from which appellees have not appealed.

It is an agreed fact that the United States leased the plant to appellant in 1946 (R. 22, Case 14,990).

Appellees attempted to introduce this lease in evidence, and the court sustained an objection to its admission.[2] The reason the court rejected the exhibit when offered at trial is the same reason it is not proper to be considered now. There is no relationship *shown* between the possible casualty losses insured against by the indemnity agreement in the lease and the injuries alleged here. Appellees cannot look to the factual matter introduced in another case and mentioned in that opinion and rely on it as evidence in this case. In short, they have attempted to place in evidence an exhibit rejected by the trial court merely by referring to a decision in another case.

J. Page 17 of appellees' brief contains several misstatements of the record concerning appellant's opportunity to foresee that injuries, such as appellees allege, would occur. The suggestion is made that each of the illustrations presented concerns injuries sustained from emanations from aluminum plant stacks. The record shows that not one of these illustrations concerns injuries of the type claimed here.

The *Arvidson* case concerned alleged damage to cattle, and Judge Boldt was concerned with cattle and

[2] The ruling of the court on this point is set forth on page 1109 of the typed transcript. While this portion of the typed transcript was designated as part of the contents of record on appeal (Appellee's Designation of Contents of Record on Appeal, 5 (g)), the same is not contained in the printed Transcript of Record.

vegetation cases when he made his reference to other cases tried in the area. If appellees intend to suggest that cases such as theirs have arisen before in this area, or anywhere, then certainly the best reference to those cases is by name and citation. The other illustrations listed by appellees refer to experiments, meetings and literature concerning the possibility of injury to those working *within a plant*, not to persons living miles away from it (R. 1556).

The question of foreseeability was directly and dramatically answered by appellees' principal witness, Dr. Hunter, when he stated, "Well, this court has made it new, sir, and this court makes history" (R. 527).

## II. THE ASSERTED BASES OF LIABILITY.

Appellees now urge (Appellees' Brief, p. 34) that these judgments should be affirmed because the fluorides escaping from appellant's plant made appellant liable because of:

(1) a trespass;
(2) implied negligence as a matter of law;
(3) inferred negligence *(res ipsa loquitur);* and
(4) a nuisance.

Simple analysis will demonstrate the confusion upon which these false contentions are based.

This confusion results from:

(1) Nonrecognition of the modern basis for classification of remedies available for asserted injury to the person;

(2) An attempt to apply remedies available for asserted injury to real property as remedies available for asserted injury to the person; and

(3) An attempt to rely in the appellate court upon bases of liability disclaimed by appellees in the trial court or which were expressly rejected by the trial court.

Tort liability for injury to the person is divided into three parts. Thus, a plaintiff must prove that:

(1) The defendant intended to interfere with plaintiff's interests;

(2) The defendant was negligent; or

(3) The defendant is liable without fault.

*Prosser on Torts (Second Edition, 1955) p. 24*

"* * * The fundamental basis of tort liability may first be divided into three parts—not because that number is traditional, but because every case in which such liability has been imposed has rested upon one of three, and only three, grounds for imposing it. These are:

"1. Intent of the defendant to interfere with the plaintiff's interests.

"2. Negligence.

"3. Strict liability, 'without fault,' where the defendant is held liable in the absence of any intent which the law finds wrongful, or any negligence, very often for reason of policy."

Harper on Torts (1933) Sections 6 and 7.

Each of these bases of liability will be reviewed separately as they apply to these cases.

**A. Intentional Harm.**

As appellees note in their Brief In Answer To Petition For Rehearing (p. 10), one of the issues of fact in these cases was whether appellant "knowingly, wilfully or intentionally caused" appellees' alleged personal injuries. Appellees have not asserted that the evidence in these actions supports their pre-trial contention that defendant "knowingly, wilfully or intentionally" caused appellees' alleged personal injuries. Their failure to make such assertion can only be attributed to their recognition that the record does not contain any evidence to support such a contention. The trial court ruled against appellees on this point near the close of appellees' case in chief in excluding proof in support of their claim for alleged punitive damages.[3]

[3] The ruling of the court on this point is set forth on pages 1086-1091 of the typed transcript. While this portion of the typed transcript was designated as part of the contents of record on appeal (Appellee's Designation of Contents of Record on Appeal, 5 (f)), the same is not contained in the printed Transcript of Record.

The court confirmed this fact later in the trial (R. 1158-1159). No further consideration need be given this matter as a possible basis for the liability asserted by appellees.

**B. Liability Without Fault.**

The suggestion to this court that the doctrine of liability without fault is applicable to the facts in these cases was first made in Brief of Appellees (p. 11). Appellant has already pointed out in Appellant's Reply Brief (pp. 1-6) and Petition for Rehearing en Banc (pp. 13-15) why this doctrine is not applicable to the cases at bar. The reasons for the nonapplicability of the doctrine are summarized briefly below:

1. No reference to the doctrine of liability without fault is contained in the contentions of the parties and the issues derived therefrom as set forth in the pre-trial orders.

2. The doctrine is not applicable where the risks giving rise to liability are not foreseeable by the defendant at the time the personal injuries are alleged to have been caused. Thus, a defendant is liable only to one "whose person * * * [he] should recognize as likely to be harmed."

*3 American Law Institute, Restatement of the Law of Torts (1938), Section 519, p. 41*

> "Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels *the actor should recognize as likely to be harmed* by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous although the utmost care is exercised to prevent the harm." (Emphasis added)

There was no evidence introduced by appellees to show that appellant, or its officers, had any reason to believe that there was any particular danger to human beings involved in the operation of the plant. This is clear from the statement made by the court at the conclusion of the testimony of the next to the last witness called by appellees in their case in chief:[4]

> "* * * And I am frank to say that from the evidence alone in this case this Court is not saying now that with the evidence before it that the officers of this corporation had any reason to believe that there was any particular danger to human beings involved in their actions."

3. On at least three occasions the trial court indicated that the doctrine of strict liability was not applicable:

[4] The statement of the court on this point is set forth on pages 1089-1090 of the typed transcript. While this portion of the typed transcript was designated as part of the contents of record on appeal (Appellee's Designation of Contents of Record on Appeal, 5 (f)), the same is not contained in the printed Transcript of Record.

(a) in denying the appellant's motions for a directed verdict;

*Martin v. Reynolds Metals Company*, (D. Or., 1955) 135 F. Supp. 379, 380

(b) in denying appellees' request to submit the cases to the jury on the basis of this doctrine (R. 1893);[5] and

(c) in denying the appellant's motions to set aside the verdicts of the jury returned in each case (Memorandum Opinion dated October 12, 1955, p. 2):

"The Court concluded that the so-called doctrine of absolute liability under the facts of the case was not applicable under the decisions of the Oregon Supreme Court."

### C. Negligence.

As previously noted (supra, p. 13), appellees argue that appellant was negligent in operating the aluminum reduction plant and is liable because of:

(1) "imputed or implied negligence" and

(2) the doctrine of res ipsa loquitur.

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[5] Appellees practically concede that the doctrine is not applicable when they state in their Brief In Answer To Petition For Rehearing (p. 31):

"In the opinion of Judge Denman is the statement that, 'We think that the doctrine of *Fletcher v. Rylands* also applies.' This statement is entirely correct under the Oregon law, though not strictly necessary to the decision, inasmuch as the trial court had not instructed the jury concerning strict liability but had instructed on the milder rule of res ispa loquitur."

Appellant has already demonstrated the fallacy of the argument of appellees in the two briefs and the petition filed by it herein. Only two additional comments are necessary:

1. The court recognized that there was no evidence introduced by appellees to show that appellant, or its officers, had any reason to believe that there was any particular danger to human beings involved in the operation of the plant. For, as previously noted, at practically the close of appellees' case in chief, the court stated:[6]

> "* * * And I am frank to say that from the evidence alone in this case this Court is not saying now that with the evidence before it that the officers of this corporation had any reason to believe that there was any particular danger to human beings involved in their actions."

The remarks of appellees that appellant foresaw, or could have foreseen, injury to humans must, therefore, be disregarded. It is obvious, in view of the statement of the court set forth above, that appellant was not guilty of negligence.

2. In its Petition for Rehearing en Banc, appellant states (p. 4):

[6] The statement of the court on this point is set forth on pages 1089-1090 of the typed transcript. While this portion of the typed transcript was designated as part of the contents of record on appeal (Appellee's Designation of Contents of Record on Appeal, 5(f)), the same is not contained in the printed Transcript of Record.

> "This court has taken this evidence of four years of persistent effort and tremendous expense and relied on it as evidence of negligence by erroneously stating that appellant did nothing to improve its controls until 1950 and by finding 'no showing' that all of it could not have been done earlier."

Seizing upon the words "persistent effort," appellees misstate appellant's position as follows (Appellees' Brief, pp. 29-30):

> "Appellant has a contention that its evidence showing 'persistent effort' (due care) to minimize the output of fluorides was not contradicted, and therefore res ipsa loquitur should not have been used to take the case to the jury."

citing in support thereof the following statement of Professor Prosser in his Handbook of the Law of Torts (Second Edition, 1955) at pages 216-217:

> "But if the defendant merely offers evidence of his own acts and precautions amounting to reasonable care, it is seldom that a verdict can be directed in his favor. The inference from the circumstances remains in the case to contradict his evidence. If he testifies that he used proper care to insulate his wires, to inspect his chandelier, to drive his bus, or to keep defunct mice and wandering insect life out of his bottled beverage, the fact that electricity escaped from the wires, that the chandelier fell, that the bus went into the ditch and the bug was in the bottle, with the background of common experience that such things do not usually happen if

proper care is used, may permit reasonable men to find that his witnesses are not to be believed, that the precautions described were not sufficient to conform to the standard required or were not faithfully carried out, and that the whole truth has not been told."

Appellant has no quarrel with the substance of Professor Prosser's statement. However, the statement is relevant only when the doctrine of *res ipsa loquitur* is applicable to a case. Thus, if the doctrine of *res ipsa loquitur* is not applicable, a motion for a directed verdict should be granted when plaintiff, as here, introduces no evidence of negligence on the part of defendant, or when, as here, the defendant's uncontradicted evidence shows the defendant is not negligent.

On the other hand, if the doctrine of *res ipsa loquitur* is applicable, which appellant does not concede, it cannot be contradicted or overthrown by the type of evidence cited by Professor Prosser. The type of evidence that will contradict or overthrow the doctrine is set forth by Professor Prosser in the paragraph preceding that quoted by appellees:

"* * * If the defendant proves definitely by uncontradicted evidence that the occurrence was caused by some outside agency over which he had no control, *that it was of a kind which commonly occurs without negligence on the part of anyone, or that it could not have been avoided by the exer-*

*cise of all reasonable care*, the inference of negligence is no longer permissible, and the verdict is directed for the defendant. The res ipsa case has been overthrown by showing that it is not a res ipsa case." (Emphasis added)

The following cases support the italicized portion of the above quotation:

*Engelking v. Carlson* (1939) 13 Cal. (2d) 216, 88 P. (2d) 695, 697

*Oliver v. Union Transfer Co.* (1934) 17 Tenn. App. 694, 71 S.W. (2d) 478, 480

*Bollenbach v. Bloomenthal* (1930) 341 Ill. 539, 173 N.E. 670, 672

*Tavani v. Swift & Co.* (1918) 262 Pa. 184, 105 Atl. 55, 56

*Richards v. Oregon Short Line R. Co.* (1912) 41 Utah 99, 123 Pac. 933, 937

*Ryder v. Kinsey* (1895) 62 Minn. 85, 64 N.W. 94, 95

The uncontradicted evidence in this case is that fluorides escape from all aluminum reduction plants and that this is the kind of occurrence "which commonly occurs without negligence on the part of anyone." This conclusion is supported by the references in the record to aluminum reduction plants throughout the United States and Europe and by the reference to the Troutdale plant in *Arvidson, et al, v. Reynolds Metals Com-*

*pany (W.D. Wash., S.D., 1954) 125 F. Supp. 481; affirmed per curiam (CA 9, 1956) 236 F. (2d) 224; cert. denied (1957) ____ U.S. ____, 1 L. Ed. (2d) 323,* where Judge Boldt, in denying damages for alleged injuries to cattle for the period 1948 to 1953, stated (pp. 482-483):

> "* * * In both plants aluminum is produced by processes which *unavoidably* cause gases, fumes and airborne particulates to be formed, some part of which are discharged into the atmosphere from the plant stacks. The effluence contains fluorides in some form and amount * * *.
>
> "* * * Whether the measures taken by defendant to minimize the escape of fluorides from its plants are the maximum possible consistent with practical operating requirements is yet to be determined, but apparently American industry has not yet developed anything better." (Emphasis added)

The evidence is also uncontradicted that the escape of fluorides from the Troutdale plant was an occurrence which "could not have been avoided by the exercise of all reasonable care" for the following reasons:

(1) As noted, the manufacture of aluminum "unavoidably" causes fluorides to be formed.

(2) The fume control system installed by appellant before it commenced operating the Troutdale plant was "the then best developed washing

system," "it was the best available" being used by the industry, "at that time there was no better control system in any other aluminum plant in the United States" and there was no control system operating in any aluminum reduction plant with a higher operating efficiency (R. 440-441, 1160, 1278).

(3) The foregoing control system was replaced by a system which captured 90 per cent of the fluorides otherwise escaping. The details concering the design and installation of this second system have already been discussed. No other aluminum plant in this country had or has such a system (R. 1530).

It follows, therefore, that the inference of negligence arising from the trial court's mistaken application of the doctrine of res ipsa loquitur was not permissible in these cases because of appellant's uncontradicted evidence. Accordingly, it was incumbent upon the court to direct verdicts in favor of appellant.

**D. Trespass.**

If Professor Prosser's analysis is correct, namely, that recovery for injury to the person must rest upon proof of intent, negligence or liability without fault, what basis, if any, is there for appellees' recovering

upon their claims of "trespass" and "nuisance" (Appellees' Brief, p. 34)?

As for the claim of trespass, it should be remembered that the trial court did not submit these cases to the jury on that theory.

In asserting liability for trespass, appellees are obviously contending that a trespass to their persons has occurred.[7] However, trespass to the person no longer exists as a cause of action. It has been replaced by such causes of action as battery, assault and false imprisonment, all of which involve intentional wrongs. *Prosser, Handbook of the Law of Torts (Second Edition, 1955) pp. 27-28*

> "* * * Modern law has almost completely abandoned the artificial classification of injuries as direct and indirect, and looks instead to the intent of the wrongdoer, or to his negligence. The first step was taken when the action on the case was extended to include injuries which were not intended but were merely negligent, and were inflicted indirectly. Because of the greater convenience of the action, it came to be used quite generally in all cases of negligence, while trespass remained as the remedy for the greater number of intentional wrongs. Terms such as battery, assault and false imprisonment, which were varieties of trespass, came to be associated with intent, and negligence emerged as a separate tort."

[7] Obviously, any liability of appellant cannot be based upon a claimed trespass to real property (Appellant's Reply Brief, pp. 11-12). Apparently, appellees recognize this in charging appellant with a form of trespass to the person, "assault with impunity" (Appellees' Brief, p. 27).

Appellees' claim of trespass to their persons must, therefore, fall under Professor Prosser's first classification of intentional harm. As previously shown (supra, p. 15), appellees failed to prove that appellant intended to cause the injuries which they pretended to have sustained. Accordingly, no basis exists for affirming the judgments on the basis of "trespass."

Undoubtedly, for the reasons set forth above, Judge Denman did not accept appellees' contention (Brief of Appellees, pp. 6-10) that appellant was liable to appellees for trespass.

**E. Nuisance.**

In the appellate court, appellees contended for the first time that these judgments should be affirmed because appellees claimed injuries resulted from a nuisance (Appellees' Brief, p. 34). No such contention appears in any of the pre-trial orders. The trial court recognized that appellees had disclaimed this theory as a basis for recovery (Memorandum Opinion dated October 12, 1955, p. 2):

> "* * * Furthermore, the plaintiffs, through their counsel, disclaimed any nuisance theory."

Accordingly, the cases were not submitted to the jury on this theory.

Even if the cases had been submitted to the jury on this theory, the judgments would have to be reversed. A nuisance has been defined by the American Law Institute:

*4 American Law Institute, Restatement of the Law of Torts (1939) Section 822, p. 226*

> "The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,
>
> "(a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and
>
> "(b) the invasion is substantial; and
>
> "(c) the actor's conduct is a legal cause of the invasion; and
>
> "(d) the invasion is either
>
> "(i) intentional and unreasonable; or
>
> "(ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct."

The foregoing definition has received the sanction of the Oregon Supreme Court.

*Amphitheaters, Inc. v. Portland Meadows* (1948) 184 Or. 336, 344, 348, 198 P. (2d) 847

Of course, the burden of proving by a preponderance of the evidence the existence of each of the elements present in the foregoing definition rests upon appellees.

The foregoing definition is consistent with Professor Prosser's categorizing of the three bases of liability for injury to the person. The burden of proof has not been satisfied here because of lack of proof of:

1. An intent to harm (supra, p. 15).

2. Negligence on the part of appellant (supra, p. 18).

3. Ultrahazardous conduct on the part of appellant (supra, p. 16).

It follows that the suggestion of appellees that these judgments may be affirmed on the proposition that a nuisance existed must be rejected as an absurdity.

## CONCLUSION

These history-making cases were submitted by the trial court to the jury only on the basis of alleged negligence. In their efforts to have these judgments affirmed, appellees have suggested in their two briefs bases of liability which they failed to suggest to the trial court or which the trial court rejected as unfounded in fact or law. The result of these suggestions has been needlesss confusion as to a matter which, upon analysis, is simple. The cases having been submitted by the trial court to the jury only on the basis of negligence, these verdicts can be sustained only if

the evidence supports causes of action against appellant for negligence. No other basis of liability is before this court.

*Meloon v. Davis* (CCA 1, 1923) 292 Fed. 82, 87

*Johnson v. Thompson* (1950) 241 Mo. App. 1008, 236 S.W. (2d) 1, 7

*Chickasaw Lumber Co. v. Blanke* (Tex. Civ. App., 1945) 185 S.W. (2d) 140

The record in these cases is a lengthy one, and some of the matters involved are somewhat complex. However, two conclusions are obvious and apparent to anyone reviewing the record:

(1) Appellees did not introduce any evidence tending to prove that appellant failed to use the greatest possible care in minimizing the emission of fluorides from the Troutdale plant, and the uncontradicted evidence shows that appellant did use the greatest possible care in this respect.

(2) Appellees did not introduce any evidence tending to prove that appellant had any reason to foresee that there was any particular risk of injury to persons residing near the plant by fluorides escaping from the plant, and the uncontradicted evidence is that such a risk was not foreseen.

Under the circumstances no basis existed for submitting these cases to the jury.

*Kelley v. National Lead Co.* (1948) 240 Mo. App. 47, 210 S.W. (2d) 728, 731-733, 734, 735

The statement of the principal expert witness for the appellees that "this court makes history" can be applied to this court as well as the trial court. The liability imposed upon lawful industry as a result of the trial court's misapplication of the doctrine of *res ipsa loquitur* is unprecedented. The same is true with respect to Judge Denman's dictum applying the doctrine of *Fletcher v. Rylands*. Reversal of the judgments in question for the reasons stated herein and in the other briefs filed by appellant not only will remove from lawful industry this staggering burden but also will be consistent with the opinion of this court in the case of *Arvidson v. Reynolds Metals Company*.

Respectfully submitted,

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